IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2519 OF 2004

Mohan Bhojania,)
an Indian Inhabitant, residing)
at 306, Hrushikesh Apnaghar)
Society, Lokhandwala,)
Andheri (W), Mumbai - 400 053.).. Petitioner

Vs.

1. The State of Maharashtra,)
Through the Secretary to)
the Govt. of Maharashtra,)
Home Department,)
Mantralaya,)
Mumbai - 400 032.)

2. Neela Satyanarayana,)
The Principal Secretary)
to the Government of)
Maharashtra, Home Department)
(Appeals And Security),)
and Detaining Authority,)
Mantralaya,)
Mumbai - 400 032.)

3. The Superintendent of Prison,)
The Mumbai Central Prison,)
Arthur Road, Mumbai.)

4. The Superintendent of Prison,)
Nasik Road Central Prison,)
Nasik.).. Respondents

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S/Shri Shirish Gupte, Senior Advocate, with Maqsood Khan and Yogesh M.Rohira, Advocates, for the Petitioner.

Shri D.S.Mhaispurkar, APP for the Respondents.
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CORAM : R.M.S.KHANDEPARKAR &
P.V.KAKADE, JJ.

DATED : 23rd February, 2005.

ORAL JUDGMENT : (Per R.M.S.Khandeparkar, J)

1. Heard. Perused the records.

2. The petitioner challenges the order of detention issued under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter referred to as "COFEPOSA", against the father-in-law of the petitioner, viz. Shri Subhash Khetaram Choudhary, with a view to preventing him in future from smuggling goods. The challenge to the impugned order is on the ground of non-consideration of the vital documents by the detaining authority before arriving at the subjective satisfaction regarding the need for issuance of detention order against the detenu.

3. The detention order was issued on 8th November, 2004 and was served upon the detenu on 5th December, 2004. Prior to the issuance of the said detention order, the detenu had made five representations dated 26th September, 28th September, 12th October, 4th November, and 6th November of the year 2004.

4. While assailing the impugned order of detention, the learned Advocate for the petitioner has submitted that the impugned order has been issued on the ground that the detenu had exported ready made garments of low quality by declaring highly inflated value of the said goods in the export documents in order to claim undue duty drawback and DEPB benefits. Holding the said activities of the detenu to be amounting to smuggling of goods, the impugned order has been issued. Drawing attention to the abovereferred five representations made by the detenu during the months of September to November, 2004, the learned Advocate for the petitioner has submitted that none of the said representations, inspite of being vital and material documents in favour of the detenu, were placed before the detaining authority for its consideration, and consequently, on account of non-placement of such documents before the detaining authority, it has resulted in vitiating the subjective satisfaction alleged to have been arrived at by the detaining authority for the purpose of issuance of detention order against the detenu, and therefore, the order of detention is to be declared as bad-in-law ab initio. Referring to the paragraph 66 of the grounds of detention, it was sought to be contended that the same apparently discloses all the materials which were

referred to and relied upon for the purpose of passing the detention order and the same does not include any of the representations made by the detenu during the period of September, October, and November 2004. According to the learned Advocate for the petitioner, surprisingly it is sought to be contended after filing of this petition that the said representations were carefully considered along with the entire materials on record. However, once it is revealed from the grounds of detention that the materials which were referred to and relied upon by the detaining authority for the purpose of passing detention order, did not include the said representations, the claim of the detaining authority in the affidavit about the consideration of those representations is to be held as purely an after-thought and an attempt to fill up the lacuna.

5. Placing reliance in the decision of the Apex Court in the matter of **M.Ahamedkutty v.Union of India & Anr.,** reported in 1990 Vol.II SCC 1, the learned Advocate for the petitioner has submitted that the necessity to consider the relevant documents and further requirement of furnishing copies of such documents even though such documents initially belonged to the detenu himself has been clearly

emphasized by the Apex Court in the said decision. Reliance was also placed in the decision in the matter of **Ashok Kumar v. Union of India & Ors.,** reported (1988)1 SCC 541 in support of the contention that non-supply of the copies of the representations to the petitioner along with the grounds of detention clearly resulted in non compliance of the provisions of Article 22(5) of the Constitution of India. Reliance was also placed in the decision in the matter of **Mrs.Pathooty v. State of Kerala & Anr.,** reported in 2000 Vol.106 Cr.L.J. 1189, **M.K.Abdulla v. State of Kerala & Ors.,** reported in 2000(106) Cr.LJ 1930 and **P.U.Abdul Rahiman v. Union of India & Ors.,** reported in 1990 Indlaw SC 204. Attention was also drawn to the dictionary meaning of the word "consider" as defined in the Webster as well as in the Universal Dictionary by K.J.Ayyer, 13th Edition, while contending that the consideration of a document would mean the application of mind with a view to form opinion and since the grounds in support of the detention order do not disclose even reference to the representations, it is apparent that the same were not at all considered. Reliance is also placed in the decision in the matter of **Powanammal v. State of Tamil Nadu & Anr.,** reported in AIR 1999 SC 618.

6. The learned APP, on the other hand, while referring to the pleadings in the petition, has submitted that the grounds relating to the challenge to the impugned order is restricted to non-placement of the representations made by the detenu prior to issuance of detention order, and on that count, the subjective satisfaction of the detaining authority being vitiated. Being so, the respondents were required to meet the said ground of challenge, and accordingly, in the affidavit in reply, the respondents have explained that the representations in fact were placed before the detaining authority and were carefully considered by it. Being so, the point regarding non-supply of copies of the representations is tried to be raised for the first time in the course of the argument. As regards the representations made by the detenu prior to the issuance of detention order are concerned, it is the contention on behalf of the respondents that the same were not vital documents, and therefore, they were not relied upon for the purpose of arriving at the subjective satisfaction. However, the said documents were duly and carefully considered and since the said documents were not relied upon, they were not required to be entered in the list annexed to the grounds of detention nor the copies thereof were required to be furnished to the

detenu, unless asked for. Reliance was sought to be placed in the decision of the Apex Court in the matter of **M.Ahamedkutty's case (supra), Ahamed Nassar v. State of Tamil Nadu & Ors.,** reported in (1999) 8 SCC 473, **Sitthi Zuraina Begum v. Union of India & Ors.,** reported in 2002 AIR SCW 4807, and **K. Varadharaj v. State of Tamil Nadu & Anr.,** reported in (2002)6 SCC 735.

7. Though the various contentions are sought to be raised in relation to the failure on the part of the respondents to place the representations by the detenu before the detaining authority before issuance of detention order, it is not necessary to deal with all the said points but suffice to refer to only two issues, i.e. (i) objection which is sought to be raised on behalf of the respondents regarding the limited scope of the ground of challenge, and (ii) whether the subjective satisfaction of the detaining authority was vitiated on account of non-placement of the representations by the detenu for its consideration ?

8. As regards the objections sought to be raised on behalf of the respondents, certainly the learned APP is justified in contending that the grounds

nowhere disclose the grievance on behalf of the petitioner about the non-supply of the copies of the representations to the detenu. Indeed, the pleadings in the petition are totally silent on the said issue. It is pertinent to note that even after filing of the affidavit-in-reply stating that the representations were carefully considered by the detaining authority, the petitioner has not preferred to amend the petition or to take additional ground as such in relation to the non-supply of copies of the representations. Being so, the petitioner is not entitled to raise such ground at the eleventh hour without giving proper opportunity to the respondents to meet the said challenge.

9. As regards the ground of challenge to the impugned order of detention, it clearly states that the subjective satisfaction of the detaining authority was vitiated on account of non-placement of the representations made by the detenu before the detaining authority before issuance of the detention order. Obviously, non-placement of the documents is in relation to the requirement of consideration of such documents by the detaining authority before arriving at the subjective satisfaction and not merely as an additional materials to be placed before it in

relation to the case of the detenu. Being so, the contention on behalf of the respondents that the ground of challenge was restricted merely to the non-placement of the documents, and therefore, no other related issues can be considered in the matter, is totally devoid of substance. The very grievance of the petitioner is in relation to the detention order, as revealed from the pleadings in the petition, pertains to failure on the part of the respondents to place the said representations before the detaining authority for its consideration before being the subjectively satisfied about the need for such issuance of the detention order.

10. Undisputedly, the grounds in support of detention order in the paragraph 66 thereof clearly reveal the materials which were considered by the detaining authority for the purpose of arriving at the subjective satisfaction in the matter. The paragraph 66 reads thus:-

> "While passing the detention order under Cofeposa Act, 1974, I have referred to and relied upon the documents mentioned in the enclosed list which are also being served on you."

The enclosed list enumerates as many as 222 documents. However, none of the documents enumerated therein include representations made by the detenu during the period from 26th September, 2004 to 6th November, 2004. Plain reading of the paragraph 66 along with the list of documents annexed to the grounds in support of the detention order, obviously, discloses that the materials which were considered by the detaining authority for the purpose of arriving at the subjective satisfaction did not include the representations made by the detenu prior to issuance of the detention order. Yet the detaining authority in the affidavit-in-reply filed after filing the present petition, has stated that she had carefully considered the entire materials including the representations made by the detenu and only thereafter, she was subjectively satisfied about the involvement of the detenu in prejudicial activities, and therefore, thought it fit that it was necessary to detain the detenu with a view to prevent him from indulging in the activities of smuggling goods in future.

11. In the facts and circumstances which apparently disclose that the grounds in support of the

detention order expressly reveal the materials which were considered for the purpose of arriving at the subjective satisfaction containing the documents which were enumerated in the list annexed to the said grounds of detention and which were served upon the detenu and none of those documents nor the said list disclosed any reference to any of the representations made by the detenu prior to issuance of the order of detention, it is needless to say that the petitioner is justified in contending that the claim by the detaining authority in her affidavit-in-reply regarding careful consideration of the representations is purely an after-thought and an attempt to fill up the lacuna. It is pertinent to note that the representations which were made by the detenu were in relation to the various allegations sought to be made against the detenu and his reply with the explanation is to each and every allegation made against him. The allegation was that of the indulgence of the detenu in the misuse of drawback facilities by exporting the goods at the inflated value of such goods and failure to disclose the remittance pursuant to the export of such goods. The representations not only disclosed the explanation in that regard by the detenu but the same were accompanied with the copies of necessary documents in support of such explanation. Obviously,

the documents were very vital and material documents in relation to the allegation of smuggling activities on the part of the detenu and being so, the respondents cannot be heard to contend that such documents were immaterial or not relevant for consideration before arriving at the subjective satisfaction regarding the need of issuance of detention order against the detenu in relation to the allegation of his involvement in the smuggling activities and for the purpose of preventing him from indulging any such activities in future.

12. The Apex Court in **M.Ahamedkutty's case (supra)**, taking note of the various earlier decisions on the point of effect of failure on the part of the detaining authority for supply of copies of the documents referred to and relied upon by the detaining authority while issuing the detention order, had held that :-

> "The constitutional imperatives in Article 22(5) are towfold: (1) The detaining authority must, as soon as may be , i.e. as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2)

> the detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention."

It was also observed that the right is to make an effective representation and when some of the documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. Therefore, the detenu has right to be furnished with the grounds of detention along with the documents so referred to or relied upon, and any failure or even delay in furnishing such documents would amount to denial of the right to make an effective representation. While reiterating its earlier decision in **Mehrunissa v. State of Maharashtra (1981) 2 SCC 709** to the effect that the fact that the detenu was aware of the contents of the documents not furnished is being immaterial and non-furnishing of the copy of the seizure list is being fatal, it was observed that to appreciate the said view, one has to bear in mind that the detenu being in jail cannot have access to his own documents. In that connection, the Apex Court also reiterated its view in its earlier decision in **Mohd.Zakir v. Delhi Administration** (1982)

3 SCC 216 to the effect that it being a constitutional imperative for the detaining authority to give the documents relied upon and referred to in the order of detention pari passu the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately.

13. Undoubtedly, we are not concerned in the case in hand regarding failure on the part of the detaining authority to furnish copies of the representations to the detenu. However, the point assumes importance in relation to the grievance made by the petitioner about the failure on the part of the respondents to place such documents before the detaining authority before issuance of the detention order. As already observed above, the grounds in support of the detention order apparently disclose such failure on the part of the respondents and there is no satisfactory explanation in that regard in the affidavit-in-reply apart from claiming that such documents were carefully considered by the detaining authority.

14. The dictionary meaning of the word "consideration", as revealed from Wesbster Dictionary, is that ‘Act of considering; careful deliberation; pondering; meditation; reflection; Fact or thing

regarded as being the cause of, or as furnishing a motive for, an action; thoughtfulness, tender solicitude for others; thoughtful regard for.' The word "considered" carries dictionary meaning therein to mean 'well thought out, deliberated, thoroughly pondered, weighed, reflected upon'. The word "consider" came up for interpretation before the Apex Court in **The Barium Chemicals Ltd. & Anr. v. A.J.Rana & Ors.,** reported in (1972) 1 SCC 240, in the matter arising under the Foreign Exchange Regulation Act, 1947. While dealing with the issue regarding requirement of application of mind in relation to every piece of evidence and the same to be revealed ex-facie from the order, it was held that :

> "14. The words 'considers it necessary' postulate that the authority concerned has thought over the matter deliberately and with care and it has been found necessary as a result of such thinking to pass the order. The dictionary meaning of the word 'consider' is 'to view attentively, to survey, examine, inspect (arch), to look attentively, to contemplate mentally, to think over, meditate on, give heed to, take note of, to think deliberately, bethink oneself, to reflect'

(vide shorter Oxford Dictionary). According to Words and Phrases-Premanent Edition Vol.8-A ‘to consider’ means to think with care. t is also mentioned that to ‘consider’ is to fix the mind upon with a view to careful examination; to ponder; study; meditate upon, think or reflect with care. It is therefore, manifest that careful thinking or due application of the mind regarding the necessity to obtain and examine the documents in question is sine qua non for the making of the order. If the impugned order were to show that there has been no careful thinking or proper application of the mind as to the necessity of obtaining and examining the documents specified in the order, the essential requisite to the making of the order would be held to be non-existent.

15. A necessary corollary of what has been observed above is that mind has to be applied with regard to the necessity to obtain and examine all the documents mentioned in the order. An application of the mind with regard to the necessity to obtain and examine only a few of the many documents mentioned in the

> order, while there has been no such application of mind in respect of the remaining documents, would not be sufficient compliance with the requirements of the statute. If, however, there has been consideration of the matter regarding the necessity to obtain and examine all the documents and an order is passed thereafter, the Court would stay its hand in the matter and would not substitute its own opinion for that of the authority concerned regarding the necessity to obtain the documents in question."

Obviously, in cases where a document is stated to be considered for the purpose of arriving at the satisfaction, application of mind in relation to the examination of such document must be apparent on the face of the concerned order itself. In case of such document being merely referred to, certainly a reference to such document must be apparent on the face of record. In the case in hand, neither the grounds in support of the detention order nor the list annexed to the grounds in support of the detention order disclose any reference to the representations, assuming that the same were not relied upon but merely

referred to, as sought to be argued on behalf of the respondents. It is also pertinent to note that the respondents, apart from claiming in their affidavit-in-reply that the representations were carefully considered, nothing has been revealed from the records to disclose that the detaining authority had opportunity to consider the said representations either carefully or otherwise before issuance of the detention order.

15. Though the attention was drawn by the learned APP to the decision in **Abdul Sattar Abdul Kadar Shaikh's case (supra),** the Apex Court in **P.U.Abdul Rahiman's case (supra)** has clearly held that in Abdul Sattar Abdul Kadar Shaikh's case, the detenu, after unsuccessfully making two earlier attempts, again contended that certain documents which he had asked for were not given to him and, therefore, there was failure of justice, and the said contention was rejected as the documents, which he had asked for, had no relevance to his detention and no injustice had been caused to him by refusing to give him those documents on which no reliance whatsoever was placed by the detaining authority. It was further clarified that the principle stated by the Apex Court in **Abdul Sattar Abdul Kadar Shaikh's case (supra)** with regard

to the irrelevant documents sought by the detenu, cannot be said to be material in cases where the documents which are relevant, and in those cases, the decision in **M.Ahamedkutty's case (supra)** will have to be applied.

16. Reliance placed in the decision in the matter of **Sitthi Zuraina Begum's case (supra)** is of no help to the respondents as the grievance in the present petition relates to the failure on the part of the detaining authority to consider the vital documents and not merely of non-furnishing the copies of the documents. The decision in **Ahmed Nassar's case (supra)** is also of no help to the respondents. Rather it supports the petitioner's case. It was clearly held therein that "Every conceivable material which is relevant and vital which may have a bearing on the issue should be placed before the detaining authority. The sponsoring authority should not keep it back, based on his interpretation that it would not be of any help to a prospective detenu. The decision is not to be made by the sponsoring authority. The law on this subject is well settled; a detention order vitiates if any relevant document is not placed before the detaining authority which reasonably could affect his decision." Attention was also drawn to the

paragraphs 21 to 24 of the said decision which refer to three earlier decisions, viz. in the matter of **Ashadevi v. K.Shivraj, Addl.Chief Secy.to the Govt.of Guaranty** (1979) 1 SCC 222, **Ayya v. State of U.P.** (1989)1 SCC 374, and **Sita Ram Somani v. State of Rajasthan** (1986)2 SCC 86. It is pertinent to note that in all these cases, the documents were not placed before the detaining authority and were not considered by it, and therefore, it was held that it was not necessary to furnish the copies thereof to the detenu. In the case in hand, while the grounds of detention do not disclose placement of the representations before the detaining authority, but the affidavit filed by the detaining authority states of consideration of such representations by the detaining authority, without any material being placed on record in support of such contention. As already observed above, in the facts and circumstances of the case, such materials were absolutely necessary to be placed before the detaining authority before passing the order of detention.

17. The decision in **K.Varadharaj's case (supra)** is to the effect that the requirement in relation to the need of placing the documents before the detaining authority would depend upon the facts of each case.

Undoubtedly, the observations in **M.Ahamedkutty's case (supra)** are to the effect that "considering the facts the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, ...", and it was observed that "we should notice that the said observation of this Court was made on facts of that case, therefore, we cannot read into that observation of this Court that in every case where there is an application for bail and an order made thereon, the detaining authority must as a rule be made aware of the said application and order made thereon. In our opinion the need of placing such application and order before the detaining authority would arise on the contents of those documents. If the documents do contain some material which on facts of that case would have some bearing on the subjective satisfaction of the detaining authority then like any other vital material even this document may have to be placed before the detaining authority." The decision and the said observations clearly justify the contention sought to be raised on behalf of the petitioner rather than rendering any assistance to the respondents.

18. In the facts and circumstances of the case, the view that we are taking, it is not necessary to refer to other decisions cited hereinabove. For the reasons stated above, the order of detention cannot be sustained, and therefore, is liable to be quashed and set aside.

19. In the result, therefore, the Petition succeeds. The detention order against Shri Subhash Khetaram Choudhary is hereby quashed and set aside. The respondents are directed to release the detenu Shri Subhash Khetaram Choudhary forthwith unless required in any other matter. The rule is made absolute accordingly with no order as to costs.

(R.M.S.Khandeparkar, J)

(P.V.Kakade, J)